IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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ALEXANDER L. STEVAS,
CLERK

NO. 82-6257

GEORGE R. FULK, et al.,

Appellants,

vs.

TIMOTHY D. MORITZ, M.D., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

APPELLEES MOTION TO DISMISS OR, IN THE ALTERNATIVE MOTION TO AFFIRM JUDGMENT OF THE UNITED STATES DISTRICT COURT

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QUESTIONS PRESENTED

I. DO THE FEDERAL AND STATE DEFENDANTS' ACTIONS UNDER THE REPRESENTATIVE PAYEE SYSTEM VIOLATE 42 U.S.C. SECTION 407 AS INTERPRETED AND APPLIED IN THE CASE OF PHILPOTT v. ESSEX COUNTY WELFARE BOARD, 409 U.S. 413 (1973).

II. WHETHER THE STATE DEFENDANTS ARE EXCUSED FROM LIABILITY UNDER THE DOCTRINE OF OFFICIAL IMMUNITY FOR THE PAYMENT OF THE PLAINTIFF-APPELLANT, GEORGE FULK'S SOCIAL SECURITY BENEFITS FOR HIS STATE INSTITUTIONAL CARE, SUPPORT AND MAINTENANCE BY THE SUPERINTENDENT OF TOLEDO MENTAL HEALTH CENTER AS THE REPRESENTATIVE PAYEE OF THOSE BENEFITS.

STATEMENT OF THE CASE

On June 18, 1974, the Plaintiff-Appellants filed a complaint in United States District Court for the Northern District of Ohio, Western Division, Case No. C74-230 against various state officials individually and in their representative capacities.

The Fifth Count of the complaint alleged that the federal defendants' designation of Toledo Mental Health Center, a hospital operated by the Ohio Department of Mental Health, as the representative payee of Plaintiff-Fulk's Social Security benefits and such superintendent's payment of these social security benefits to such department for Fulk's state institutional care, support and maintenance in the amount of $1,362.90 violated the prohibition set forth in 42 U.S.C.A. Section 407 against the subjection of social security benefits to execution, levy, attachment, garnishment or other legal process.

With respect to the Fifth Count of the complaint, the Plaintiff demanded Judgment against the state defendants in the amount of the $1,362.90 social security benefits of the Plaintiff, Fulk, collected from the Superintendent of Toledo Mental Health Center as the representative payee for his state institutional care, support and maintenance.

The pertinent opinions, orders and Judgment entries of these United States District Court proceedings have been attached to the Plaintiffs-Appellants' Jurisdictional Statement as Appendices A, B and C.

Although the complaint included counts I and II involving the state defendants, the Plaintiffs-Appellants' Jurisdictional Statement does not address them. This statement in opposition to

Jurisdiction is, therefore, not required to deal with counts I and II of the complaint which raised issues as to whether the assessment against Plaintiffs of state institutional care, support and maintenance charges violated their constitutional rights to due process and equal protection under the law.

APPELLEE'S MOTION TO DISMISS APPEAL

I. APPELLANTS' APPEAL SHOULD BE DISMISSED SINCE THE NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT WAS NOT TIMELY FILED IN THE UNITED STATES DISTRICT COURT PURSUANT TO 28 U.S.C. SECTION 2101.

On December 14, 1982, Appellants filed a Notice of Appeal To The Supreme Court of the United States from the Order of the United States District Court overruling Plaintiffs-Appellants' Motion To Alter or Amend Judgment entered October 15, 1982. See Appendix A and B. Appellants contend in their Statement of Jurisdiction that the jurisdiction of this Court is predicated upon 28 U.S.C. Section 1253.

28 U.S.C. Section 2101(a) provides:

> §2101. Supreme Court: time for appeal or certiorari; docketing; stay
>
> (a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

Appellee submits that since Appellants' Notice of Appeal was filed in the District Court 59 days after entry of the final order, the appeal should be dismissed because 28 U.S.C. Section 2101 provides that direct appeals to the Supreme Court pursuant to 28 U.S.C.

Section 1253 shall be taken within 30 days after entry of the order.

For the foregoing reasons, the Appellees submit the appeal should be dismissed.

THE APPELLANTS' QUESTIONS ARE NOT SUBSTANTIAL

I. DO THE FEDERAL AND STATE DEFENDANTS' ACTIONS UNDER THE REPRESENTATIVE PAYEE SYSTEM VIOLATE 42 U.S.C. SECTION 407 AS INTERPRETED AND APPLIED IN THE CASE OF PHILPOTT V. ESSEX COUNTY WELFARE BOARD, 409 U.S. 413 (1973).

42 U.S.C. Section 407 is expressly limited to the prohibition against subjecting social security benefits to execution, attachment, levy, garnishment or other legal process. The case of Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973) involved the use of legal process in the form of a bank attachment to reach the social security recipient's checking account as enforcement of a Judgment obtained against him for reimbursement of welfare benefits previously advanced which were duplicated by social security benefits later paid him for the same period of time as that involved in the prior payment of the welfare benefits.

In the case at bar, the Plaintiffs-Appellants have not shown that the social security benefits in question have been subjected to any legal process, either prior to payment or after payment to the institution representative payee. The evidence in this case only demonstrates that the institutional representative of the patients'-appellants' social security benefits set aside certain specified amounts for their incidentals and amounts necessary for their clothing and paid the balance to the Ohio Department of Mental Health for their customary and statutory

state institutional care, support and maintenance charges under O.R.C. 5121.03, 5121.04, (B)(1) and 5121.06(A)(1) only upon being billed for them by that department's Bureau of Support.

In the payment of social security benefits belonging to the Plaintiffs-Appellants, the institutional representative payees were merely complying with the requirements set forth in 20 C.F.R. Section 404.1603 that such benefits be paid for the use and benefit of the beneficiary; 20 C.F.R. Section 404.1604 that use of such benefits for the recipient's current maintenance shall be considered as payment for the beneficiary's use and benefit and 20 C.F.R. 404.1606 that the highest priority shall be given for the payment of benefits for the beneficiary's customary charges made by the institution when he was confined to a federal or state institution. These regulations were promulgated pursuant to 42 U.S.C. Section 405(J).

The existence and application of the aforementioned regulations were not considered in either the case of Philpott v. Essex County Welfare Board, supra, or Tidwell v. Weinberger, 73-C-3014 (N.D. Ill. 1976), affd. on other grounds, 677 F.2d 560 (5th Cir., 1982).

In addition, the case of Tidwell v. Weinberger, supra, has no bearing on the resolution of the Fifth Count of the complaint filed in the case at bar because the former case involved the rendering of declaratory judgment relief relative to the future use by the Illinois Department of Mental Health of a form which competent social security benefits recipients were asked to sign, rather than seeking a money judgment for damages. Such form authorized the Superintendent of the hospital where the patient

recipient was confined to apply all of his social security benefits above $400.00 toward the cost of his care, support and maintenance. This form did not disclose that the authorization was revocable and not a requirement for treatment and that social security benefits were exempt from legal process against state violations regarding the use of these benefits. The Fifth Count involved in the care at bar, however, as prosecuted in the United States District Court demanded only a money judgment against the federal and state defendants for the use of Plaintiff-Fulk's social security benefits by the institutional representative payee for his state institutional care, support and maintenance prior to the commencement of this action.

The Eleventh Amendment of the United States Constitution precludes the rendering of a money judgment against the states to compensate a victim of prior unlawful action by a state official, Edelman v. Jordan, 415 U.S. 651 (1973) and Quern v. Jordan, 440 U.S. 332 (1979). This principle of law was set forth in the first syllabus of Edelman v. Jordan, supra, as follows:

> A suit by private parties seeking to impose a liability payable from public funds in the state treasury, is foreclosed by the Eleventh Amendment if the state does not consent to suit.

The plaintiffs in Edelman v. Jordan, supra, sought judgment payable from the state treasury for all prior alleged constitutional violations committed against plaintiffs by state officials in the form of compensation for aid to the aged, blind and disabled benefits administered under a joint federal-state program because the State Department of Public Welfare failed to comply with the federally mandated time limit processing applications for these

benefits. That case is no different from the Fifth Count of the Complaint which sought reimbursement from the state treasury for alleged prior violations of 424 U.S.C. Section 407.

Courts have also recognized that merely requiring the payment of a legally enforceable obligation when social security benefits become available does not violate 42 U.S.C. Section 407 and the Philpott case, Tunnicliff v. Commonwealth, Department of Public Welfare, 483 PA 275 (1978); Moore v. Colautti, 483 F.Supp. 357, affd. 633 F.2d 210 (2d Cir., 1980); and French v. Department of Social Services, 92 Mich. App. 701 (1979).

In each of these cases, an applicant for relief or aid to dependent children benefits through the county of residence on an interim basis pending the receipt of social security disability or SSI benefits including the same periods of time as the aforementioned state benefits was required to sign an authorization and agreement for repayment of these general relief or AFDC benefits upon receipt of their social security disability or SSI benefits. In each of these cases, the court found that the use of the agreement in question did not violate 42 U.S.C. Section 407 and the letter and spirit of the Philpott decision regardless of whether the complaint by the plaintiff-social security disability or SSI benefits was for refund of those benefits paid under such agreements, Tunnicliff v. Commonwealth, Department of Public Welfare, supra, and French v. Department of Social Services, supra, or for declaratory and injunctive relief against the use of those repayment agreements, Moore v. Colautti, supra.

These principles of law are most succinctly set forth in syllabus Nos. 2-4 inclusive in Tunnicliff v. Commonwealth, Department of Public Welfare, supra, as follows:

"2. Mere failure of the State Department of Public Welfare, which granted appellants interim assistance pending their reception of SSI benefits, to inform appellants that they might assert their Philpott rights and resist collection of their debt by use of legal process from one specific source--the SSI benefits--did not render appellant's repayment involuntary.

"3. Department of Public Welfare has no affirmative duty to inform its debtors of methods of evading their legal debts.

"4. Signing of these agreements with non-disclosure by the Department of Public Welfare to AFDC benefits of Philpott rights, without more, are not tantamount to legal process, nor did they render reimbursement by appellants to Department of Public Welfare involuntary, therefore, there was full compliance with both the spirit and letter of Philpott and Sec. 407."

The payment by institutional representative payees of social security benefits for the state institutional care, support and maintenance charges incurred by the plaintiffs-appellants in the case at bar is analagous to the repayment of AFDC or Welfare benefits by the appellants-recipients in the cases of Tunnicliff v. Commonwealth, Department of Public Welfare, supra; Moore v. Colautti, supra, and French v. Department of Social Services, supra, in the following respects:

1. Obligations for which repayments were made in those cases and payment was made in the case at bar were legally enforceable with legal bases of the obligation for plaintiffs'appellants state institutional care, support and maintenance charges being CFC Secs. 5121.03, 5121.04(B)(1) and 5121.06(A)(1).

2. There was no legal process involving the enforcement of any judgment on the claims in question used to compel payments of claims for reimbursement for general welfare or AFDC benefits in those cases and state institutional care, support and maintenance charges in the case at bar.

3. The use of social security or SSI benefits for repayment of the obligation to reimburse the state for advances made for AFDC or general welfare benefits without disclosure of the existence of Philpott rights to debors-recipients in those cases did not render the repayment of those obligations involuntarily or contrary to Sec. 407. Similarly, in the case at bar, payment by institutional representative payees of the plaintiffs-appellants state institutional care, support and maintenance charges incurred in the case at bar does not niolate Sec. 407 or the Philpott case's letter or spirit.

II. WHETHER THE STATE DEFENDANTS ARE EXCUSED FROM LIABILITY UNDER THE DOCTRINE OF OFFICIAL IMMUNITY FOR THE PAYMENT OF THE PLAINTIFF-APPELLANT, GEORGE FULK'S SOCIAL SECURITY BENEFITS FOR HIS STATE INSTITUTIONAL CARE, SUPPORT AND MAINTENANCE BY THE SUPERINTENDENT OF TOLEDO MENTAL HEALTH CENTER AS THE REPRESENTATIVE PAYEE OF THOSE BENEFITS.

Even if this Court were to resolve Question I as set forth in the affirmative, nevertheless the state defendants are excused from liability for the application of plaintiff-appellant, George Fulk's, social security benefits by his institutional representative payee toward the cost of his state institutional care, support and maintenance by the doctrine of official immunity as recognized by this Court in the cases of Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975); and O'Connor v. Donaldson, 422 U.S. 563 (1975). Each of these cases recognized that official immunity excusing a state official acting within the scope of his position from liability for taking action or failing to act in such a manner which violated the plaintiff's rights under the constitution or federal or state statutes exists under the following circumstances:

1. The state official defendants had reasonable cause to believe that their action or omissions did not violate federal or state statutes or the constitution when they took the action or made the omissions subject to the complaint.

2. Good faith belief by the state officials that their actions or omissions subject to the complaint were not contrary to federal or state statutes or the constitution.

In the case at bar, the state defendants' actions set forth in the complaint's Fifth cause of action were the product of their good faith belief that such actions were not contrary to law. Such good faith belief arises from the following sources:

1. Lack of any proven ill will, malice, bad feelings toward the plaintiff-appellant, George Fulk, or actual intention on their part to violate his constitutional or Section 407 rights relative to the use of his social security benefits toward the cost of his previously furnished care, support and maintenance.

2. Reasonable belief that the state defendants' actions regarding the use of George Fulk's social security benefits to pay the cost of his state institutional care, support and maintenance did not violate Section 407 and/or the constitution (supremacy clause) because such payment of these benefits was made on a legally enforceable obligation pursuant to the requirements of 20 C.F.R. Section 404.1603, 20 C.F.R. Section 404.1604 and 20 C.F.R. Section 404.1606 without legal process covering the plaintiffs-appellants' social security benefits in the possession of institutional representative payess.

The immediately preceding paragraph of this statement in opposition to Jurisdiction sets forth the application of the

reasonable belief test for the defense of official immunity as excusing them from liability for the taking of the actions referred to in the complaint's Fifth count.

In addition, the plaintiffs-appellants' Jurisdictional Statement discussion of the defense of official immunity is limited to the alleged non-existence of the good faith test for its use. Such discussion is promised solely on the purported use of plaintiff-appellant, Fulk's social security benefits to pay his support by the institutional representative payee after the termination of such status. Such action by the institutional representative payee was not established by the record. Even is such action, however, were established by the record, there is no proof that there was lack of good faith in this disposition of the plaintiffs-appellants' social security benefits, the possession of which was initially lawfully obtained by the institutional representative payees for the following reasons:

1. The social security benefits used to pay a legally enforceable debt without their being subjected to prohibited legal process.

2. Use of the social security benefits in question was permitted and required by 20 C.F.R. Sections 404.1603, 404.1604 and 404.1606.

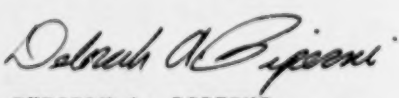
3. Institutional representative payess of social security benefits were under no known or established legal duty to assert Philpott and Section 407 rights against the collection of those benefits without legal process.

CONCLUSION

For the foregoing reasons, Appellees urge this Court to dismiss the appeal as not timely filed. In the alternative, Questions I and II set forth in this Statement in Opposition to Jurisdiction should be resolved in the negative and positive respectively. Since these questions are the only ones discussed in the plaintiffs-appellants' Jurisdictional Statement, it, therefore, follows that such statement presents no substantial questions for resolution by this Court.

Respectfully submitted,

ANTHONY J. CELEBREZZE, Jr.
Attorney General of Ohio



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appellees' Motion To Dismiss Or, In The Alternative Motion To Affirm Judgment Of The United States District Court has been mailed, via the United States first class mail service, postage prepaid, to:

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CERTIFICATE OF MAILING

I, Gene W. Holliker, a member of the Bar of the Supreme Court of the United States hereby swear that I deposited Appellees' Motion To Dismiss Or, In The Alternative, Motion To Affirm The Judgment Of The United States District Court, in the United States first class, postage prepaid and addressed to Clerk of the United States Supreme Court, U.S. Supreme Court Building, One First Street, N.E., Washington, D.C. 20543, on this 30th day of MARCH, 1983.

Gene W. Holliker
GENE W. HOLLIKER

State of Ohio :
: SS.
County of Franklin :

Sworn to before me and subscribed in my presence this 30th day of MARCH, 1983.

Deborah Ann Pierni
NOTARY PUBLIC

DEBORAH ANN PIERNI
ATTORNEY AT LAW
NOTARY PUBLIC - STATE OF OHIO
MY COMMISSION HAS NO EXPIRATION DATE
SECTION 147.03 R.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

GEORGE R. FULK, et al.,	:	Case No. C-74-230
Plaintiffs,	:	CIVIL ACTION
v.	:	
TIMOTHY MORITZ, M. D., et al.,	:	
Defendants.	:	

FILED
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U.S. DISTRICT COURT
NORTHERN DISTRICT
TOLEDO, OHIO

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that George R. Fulk, et al., the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order overruling plaintiffs' motion to alter or amend judgment entered in this action on October 15, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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APPENDIX A

CERTIFICATE OF SERVICE

Copies of the foregoing Notice of Appeal to the Supreme Court of the United States were sent by ordinary mail, this 13th day of December, 1982 to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
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U.S. DISTRICT COURT
NORTHERN DISTRICT
TOLEDO, OHIO

George R. Fulk, et al.,

Plaintiffs

Case No. C 74-230

vs.

Timothy Moritz, M.D., et al.,

MEMORANDUM AND ORDER

Defendants

YOUNG, J.:

This cause is before the Court on the plaintiffs' motion to alter or amend the judgment and for re-hearing. Defendants have opposed this motion.

Plaintiffs originally brought this action in 1974, challenging certain practices of state and federal regulations requiring those who were involuntarily committed to mental institutions to pay for their care, if financially able to do so. Plaintiffs also attacked the procedures whereby their social security payments were paid to state officials to defer the cost of their keep. Under the laws then applicable, a three-judge Court was constituted to hear the case.

On September 28, 1981, the Court, all three judges concurring, dismissed the action as to both the state and federal defendants. In the present motion brought pursuant to Rule 59 of the Federal Rules of Civil Procedure, plaintiffs ask the Court to alter or amend the findings. In fact, plaintiffs do not seek an alteration or amendment of the judgment; they seek a wholesale reversal and entry of judgment in their favor.

The Court is of the opinion that a Rule 59 motion is improper here, as it is an attempt to re-argue the applicable law. Full consideration was given to plaintiffs' legal theories. In a six-page opinion, the three-judge Court held that it lacked jurisdiction over the claims against the federal defendants, and that the claims against the state defendants were without merit. A motion under Rule 59 to alter or amend the judgment cannot be used as a substitute for appeal.

Erickson Tool Company v. Balas Collet Company, 277 F. Supp. 226, 234 (N.D. Ohio 1967) aff'd, 404 F.2d 35 (6th Cir. 1968); Durkin v. Taylor, 444 F. Supp. 879, 889 (E.D. Va. 1977).

Plaintiffs vigorously assert that "the Court is in error" as to its legal conclusions. (Memorandum in Support of Motion, p. 4). It may be that the Court did err; however, the remedy is to file an appeal, not re-argue the legal issues in the same forum. The Court believes it reached the proper conclusion in its prior opinion rejecting the plaintiffs' claims. If it did not, the avenue of appeal is yet open to them to have the alleged error corrected.

THEREFORE, for the above stated reasons, good cause appearing, it is

ORDERED that plaintiffs' motion to alter or amend the judgment and for re-hearing should be, and it hereby is OVERRULED.

Edwards, Circuit Judge, and Walinski, Judge, concur.

IT IS SO ORDERED.

United States Circuit Judge

United States District Judge

Sr. United States District Judge